(3)

90-609

No. _____

The Supreme Court of the United States

October Term, 1990

REICHHOLD CHEMICALS, INC.,

Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 515, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Motion for Leave to File a Brief and Brief of Capital Associated Industries, Inc. as *Amicus Curiae* in Support of Petition for Certiorari

BRUCE A. PETESCH
(Counsel of Record)
HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.

3605 Glenwood Ave., Suite 210
Post Office Box 10035
Raleigh, North Carolina 27605

Attorneys for *Amicus Curiae*

No. ____

THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

REICHHOLD CHEMICALS, INC.,

Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 515, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, and NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Motion by Capital Associated Industries, Inc. for Leave to File a Brief as Amicus Curiae in Support of the Petition for Writ of Certiorari filed by Reichhold Chemicals, Inc.

Capital Associated Industries, Inc. hereby respectfully moves the Court for leave to file the accompanying brief as amicus curiae in support of the Petition

for Writ of Certiorari filed by Reichhold Chemicals, Inc. in the above-captioned case.

The filing of this motion is necessary under Supreme Court Rule 37.2 because the Respondent Union has refused to give its consent to the filing of this amicus brief. The amicus requested written consent of all the parties to the above-referenced case by letters dated September 17, 1990. The amicus received written consent from Mr. Chris Mitchell of Constangy, Brooks & Smith, on behalf of Reichhold Chemicals, Inc., Petitioner, and Mr. Kenneth Starr, Solicitor General, on behalf of the National Labor Relations Board, Respondent. These correspondence have been filed with the Clerk of Court. However, no written consent from the Union has been received.

Capital Associated Industries Inc. requests permission to file the enclosed amicus brief to bring relevant arguments to this Court's attention that have not been included in the Petition for Writ of Certiorari. These arguments are made on behalf of a wide variety of businesses, including both large and small employers, retailers, manufacturers, and service organizations. All of these employers have an interest in the outcome of this case since the Circuit Court's decision unduly exposes employers to unspoken motivations by Union representatives regarding the reasons for recommending a strike. These issues are more fully set out in the amicus curiae brief printed within pursuant to Supreme Court Rule 33.3.

For the foregoing reasons, Capital Associated Industries, Inc., amicus

curiae, respectfully urges this Court to grant its motion to file a brief amicus curiae in support of the Petition for Writ of Certiorari in the above-referenced case.

Respectfully submitted,

Bruce A. Petesch
HAYNSWORTH, BALDWIN,
JOHNSON AND GREAVES, P.A.
Attorneys for amicus curiae
Capital Associated Industries, Inc.
Post Office Box 10035
Raleigh, North Carolina
27605

No. _____

The Supreme Court of the United States

October Term, 1990

REICHHOLD CHEMICALS, INC.,

Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 515, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, and NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Brief of Capital Associated Industries, Inc., as Amicus Curiae in Support of the Petitioner

---

This amicus curiae brief is filed by Capital Associated Industries, Inc. contingent upon the Court's granting the foregoing motion to file a brief as amicus curiae.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE AMICUS CURIAE

Capital Associated Industries, Inc., (CAI), is a not for profit employer's service association headquartered in Raleigh, North Carolina. CAI's membership is in excess of one thousand (1,000) employer facilities operating in North Carolina, including numerous Fortune 500 companies, as well as smaller employers, some with twenty-five (25) or fewer employees. CAI's membership covers a broad spectrum of enterprises, including manufacturers, utilities, retailers, financial institutions, service organizations, and health care facilities; literally organizations from all areas of the private employment sector.

CAI's interest in the Circuit Court's decision in this case is manifest. The Court's decision

reversing the National Labor Relations Board's determination exposes employers to backpay liability for strikers who were not aware of the alleged unfair labor practice, and gives union representatives the unfettered ability to call for a strike using general language and to much later successfully assert an undisclosed motive behind their actions. This decision significantly alters the respective bargaining positions of employers and employees, in opposition to the Board's decision.

ARGUMENT

I

THE COURT'S DETERMINATION THAT THE EMPLOYEES VOTED SOLELY PURSUANT TO THE UNION PRESIDENT'S RECOMMENDATIONS IS CONTRARY TO THE UNDISPUTED FINDINGS OF FACT.

The Circuit Court determined that "it is unrefuted that the employees voted to strike solely pursuant to the Union President's recommendations." Teamsters Local Union No. 515 v. NLRB, No. 88-1413, slip op. at 10 (D.C. Cir. June 22, 1990). This determination is contrary to the findings of fact made by the Administrative Law Judge and affirmed by the Board in this case. These findings of fact establish that specific contract proposals were indeed discussed at both strike vote meetings. The Circuit Court's determination to the contrary cannot withstand judicial review.

The Administrative Law Judge found that the employees and the Union President met on 2 August 1983 and 1 April 1984. During these meetings, they discussed the Company's proposals on

management rights, a no-strike clause, grievances, inspection rights, and stewards. The Administrative Law Judge found that during the meetings, the attendees specifically discussed the provisions of the no-strike proposal prohibiting a strike during the term of the contract and the honoring of picket lines. Although the Union President also used general language regarding the proposals, the evidence and binding findings of fact establish that specific contract proposals were discussed at the strike vote meetings.

The Board affirmed these findings in its initial decision in this case, Reichhold Chemicals, Inc., 277 N.L.R.B. 639 (1985) ("Reichhold I"), and reiterated its position on this issue in its Supplemental Decision. See Reichhold Chemicals, Inc., 288 N.L.R.B.

69 (1988) ("Reichhold II"). The Board determined that portions of "Respondent's contract proposals were discussed at both meetings... in detail[.]" Id. at 72. These findings were not excepted to by any party and the Circuit Court's determination is without basis.

II

THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A DETERMINATION THAT THE UNION PRESIDENT'S KNOWLEDGE OF THE NO ACCESS PROPOSAL WAS A MOTIVATING FACTOR.

Although the Union representative now claims that the Company's insistence to impasse on a no access clause was a motivation for the strike, that same Union representative never specifically talked about the clause with the employees before they voted to strike. Faced with the Board's determination

that the strike was economic, the Union made three arguments to the Board in its motion to reconsider. These arguments related to the issue of surface bargaining not to motivation for the strike. Only after the supplemental decision did the Union begin to argue that the no access proposal was a motivating factor for the strike.

The undisputed findings of fact establish that the employees discussed specific contract proposals in their meetings with the Union President but, significantly, the no access proposal was not discussed. This is strong evidence that the specific proposal was not a factor which motivated the President to recommend a strike. The President's knowledge of the proposal, without more, is not sufficient to make the strike an unfair labor practice

strike. As the Courts have stated on numerous occasions, "mere awareness of unfair labor practices is insufficient to establish [a] causal connection" between the unfair labor practices and a strike. Road Sprinkler Fitters Local 669 v. NLRB, 681 F.2d 11 (D.C. Cir. 1982), cert. denied sub nom. John Cuneo, Inc. v. NLRB, 459 U.S. 1178 (1983). See also NLRB v. Pope Maintenance Corp., 573 F.2d 898 (5th Cir. 1978); NLRB v. Colonial Haven Nursing Home, Inc., 542 F.2d 691 (7th Cir. 1976). The Circuit Court's decision in this case is contrary to its own established precedent, the decisions from other Circuits, and the Board's reasoned decision on the same facts.

III

THE COURT'S RELIANCE ON CERTAIN CASES INVOLVING THE ISSUE OF MOTIVATION IS MISPLACED.

The Circuit Court held that when employees vote to strike based solely on a Union representative's recommendation, that representative's subjective knowledge is the factor which determines whether the strike is economic or in response to unfair labor practices. In addition to the amicus' argument that the employees voted after discussing specific contract proposals, not merely on their representatives' recommendation, (see I, supra), the Court's reliance on certain cases is misplaced. More specifically, the cited cases involve situations where the employees had first-hand knowledge of, or otherwise discussed, the alleged unfair

labor practices over which they struck. In that very significant respect, those cases are distinguishable from the present case, and compel the reversal of the Circuit Court's decision.

The Circuit Court cites NLRB v. Moore Business Forms, Inc., 574 F.2d 835 (5th Cir. 1978) in support of the proposition that an unfair labor practice need only be a "contributing factor" to make a strike an unfair labor practice strike. Slip op. at 7. The amicus does not question that statement of the law, but finds the Court's citation to Moore inappropriate because of its facts.

In Moore, the employees struck because their bargaining representative was unable to reach agreement with the Company. Id. at 838. The strike was an extremely violent one and thirty-one

(31) striking employees were terminated because of alleged strike misconduct. It was later determined that some of the thirty-one (31) were wrongfully discharged. The issue presented to the court was whether the Board's determination that these "wrongful" discharges converted the economic strike into an unfair labor practice strike was supported by substantial evidence. Id. at 840. It is clear that the factual setting and the actions which make up the basis of the unfair labor practice charges in this case have no resemblance to the facts in Moore. Here, the only people aware of the Company's no access proposal were the members of the bargaining team. Additionally, there is no evidence in this record to show the employees ever discussed the no access proposal. These facts are in stark

contrast to Moore, where high profile activity (i.e., violence and termination of employment) occurred in an atmosphere where it is clear the employees knew of the actions constituting unfair labor practices. On its facts, Moore is not persuasive authority in this case.

The Circuit Court also cited Northern Wire Corp. v. NLRB, 887 F.2d 1313 (7th Cir. 1989) for the proposition that a strike need only be motivated "in part" by unfair labor practices committed by the employer for it to be an unfair labor practice strike. Id. at 1319. Again, the amicus has no quarrel with the Court's statement of the law. However, in Northern Wire, the Court pointed out that the acts constituting unfair labor practices were specifically discussed by the employees at the strike vote meeting. Just as in Moore, the

facts of Northern Wire are in sharp contrast to the facts in this case.

Likewise, in both NLRB v. Crystal Springs Shirt Corp., 637 F.2d 399 (5th Cir. Unit A 1981), and General Drivers and Helpers Union, Local 662 v. NLRB, 302 F.2d 908 (D.C. Cir.), cert. denied, 371 U.S. 827 (1962), two other cases cited by the Circuit Court, the courts relied on facts that showed the employees discussed or had first-hand knowledge of their employer's unfair labor practices before they voted to strike. Additionally, the specific unfair labor practices were discussed at strike vote meetings. This is not the case here. In this case, although the employees and the Union President discussed various of the Company's contract proposals, there was no evidence that the specific no access

provision was discussed in either meeting.

Insofar as the Circuit Court relied on the above-cited decisions when deciding the question of motivation, the Court went beyond the bounds of that precedent and significantly changed the application of existing law. In so doing, the Court rejected the Board's determination of the same issue on the same facts and failed to give the Board's considered decision proper deference.

CONCLUSION

This case presents an important question in the administration of the National Labor Relations Act. For the reasons stated above, as well as those set out in the Petition, the amicus

curiae respectfully requests the Petition for Writ of Certiorari be granted.

Respectfully submitted,

Bruce A. Petesch
HAYNSWORTH, BALDWIN, JOHNSON AND GREAVES, P.A.
Post Office Box 10035
Raleigh, North Carolina 27605
(919) 782-3340
Attorneys for Capital Associated Industries, Inc. amicus curiae

CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing Amicus Curiae Motion and Brief on all parties required to be served by enclosing the proper number of copies of same in a postpaid, properly addressed envelope, which was deposited in the United States mail as follows:

Mr. Kenneth W. Starr
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Mr. Chris Mitchell
Constangy, Brooks & Smith
1901 Sixth Avenue North
Suite 1410
Birmingham, AL 35203-2602

Mr. Gary Witlen
International Brotherhood of Teamsters, Local 515
25 Louisiana Avenue, N.W.
Washington, D.C. 20001

Ms. Julie E. Broido
National Labor Relations Board
1717 Pennsylvania Avenue N. W.
Washington, D.C. 20570

This the 22nd day of October, 1990.

Bruce A. Petesch